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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 636

A. G. REEVES STEEL CONSTRUCTION COMPANY,
a corporation,

Petitioner,

vs.

Elizabeth Weiss, Executrix.
~~COMMISSIONER OF INTERNAL REVENUE,~~

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

The A. G. Reeves Steel Construction Company, a corporation of Ohio, by John E. Hughes, its attorney, prays that the Writ of Certiorari be issued to review the judgment of the Circuit Court of Appeals of the Sixth Circuit in the above entitled case.

Summary Statement of Matter Involved.

Petitioner's petition (R. 4 to 23) alleged it has made overpayments of income and profits taxes for 1918 and 1919 to respondent's intestate; that it had filed timely claims for the refund thereof and that these refund claims for 1918 and 1919 had never been disallowed but on the contrary had been allowed by the Commissioner of Internal Revenue; that petitioner did not sue on an account stated but brought the action under the Internal Revenue Laws for money had and received by defendant's intestate in excess of the tax properly due for 1918 and 1919 (pp. 6, 7).

Respondent filed no answer but only a motion to dismiss the petition on the grounds (1) that the court had no jurisdiction and (2) that the petitioner failed to state a cause of action (R. 24).

The District Court took the case under consideration solely on the petition and motion and without evidence or hearing and granted the motion, based on its fact finding (made without evidence or hearing) without anything in the record to support it that the suit was not brought within two years of the disallowance of the refund claims (R. 26). Although it took the case under consideration solely on the petition and motion and nothing else and without any court hearing and any evidence being introduced it went outside the record and found, contrary to the allegations of the petition which the motion to dismiss necessarily admitted, that the refund claims had been disallowed in 1924 (R. 26). The petition alleged they had never been disallowed. The motion to dismiss necessarily admitted this allegation.

The Circuit Court of Appeals held that the District Court had jurisdiction (R. 35) but that in deciding the motion it had a right to go outside the record and take judicial notice of matters in the record of another case (based on a different cause of action and against a different Collector) and on this basis the Court of Appeals also held the letter, at pages 9 to 23 of the record, was notice of the disallowance of the refund claims. A reading of the letter shows there is not one word in it about the disallowance of any claim.

Jurisdiction.

Petition for rehearing was denied June 25, 1941 (R. 38).

Questions Presented.

Did the courts below, on a petition and motion to dismiss it, have a right to go outside the record, make a finding of fact based on matter *de hors* the record and base judgment thereon without according petitioner a hearing or a right to rebut the matter so judicially noticed?

Was this action of the courts below, in denying petitioner the right to be heard on this vital fact and in finding the fact against petitioner without evidence or any hearing at which evidence was introduced, a denial of due process of law in violation of the fifth amendment?

Was it such a departure from the ordinary and orderly course of judicial proceedings as to warrant the intervention of this court?

Disregarding the foregoing questions did the court below err in holding the suit outlawed where the Statute of Limitations was not pleaded as a defense, in view of *Retzer* v. *Wood, Collector,* 109 U. S. 185?

Reasons Relied On for the Allowance of the Writ.

The petition alleged facts showing a clear right in petitioner to judgment for the money sued for. No fact alleged was put in issue. A motion to dismiss was filed (R. 24). The District Court granted the motion on a ground not stated in the motion (R. 25, 26). It found as a fact (although no fact pleaded was in issue) that the refund claims had been disallowed by a credit (R. 26) and that taxpayer was so notified by letter dated February 2, 1924 (R. 26). This letter is in the record at pages 9 to 23, as part of the petition, and there is not one word in it supporting this finding. Also, the petition alleged the portion of the refund claims sued for had never been disallowed.

The writ should be granted because:

First: For a trial court to take a case under consideration solely on a petition and a motion to dismiss (necessarily admitting for the purpose of the motion all facts pleaded), and proceed without evidence or hearing to make an essential finding of fact (contrary to the fact alleged in the petition) constitutes so far a departure "from the accepted and usual course of Judicial proceedings as to call for the exercise of this court's power of supervision". It is a reasonable assertion that in the great collective experience of all Justices of this court no such a course of judicial proceedings has been observed before now.

Second: Assuming (but not conceding) a trial court has a right, on petition and motion to dismiss it, to go outside the record and notice a fact not made the basis of the motion then even if the making of a credit is a disallowance of a refund claim it is at most only *prima facie* so (see page 8 hereof). A party is entitled to a hearing on the question and to a chance to show by evidence that the claim was not disallowed. A denial of such hearing is plainly a denial of due process of law.

Third: The action of the Circuit Court of Appeals in upholding the dismissal of the suit, on the ground that R. S. 3226 was not complied with, is not only contrary to the allegations of the petition but unquestionably squarely contrary to the decision of this court in *Retzer* v. *Wood,* 109 U. S. 185. Petitioner relied on this case but the court below wholly ignored it—although writing a many page opinion. The decision below is also contrary to and in conflict with *Toledo Edison Co.* v. *McMaken,* 103 F. (2d) 72, 75, where, as in the case at bar, the action was against a Collector's intestate. This case also the court below wholly ignored although relied on by petitioner and urged on the court below. For the reason alone that the decision conflicts with *Retzer* v. *Wood,* 109 U. S. 185, the writ should issue.

The Court below held there was jurisdiction and it could not deny the petition itself stated a cause of action.

For any one of the other foregoing reasons and because there is no other way such a patently wrong decision can be corrected this petition should be granted.

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Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Statute granting jurisdiction to the District Court is U. S. C. Title 28, Sec. 41, Par. 5, which reads in the applicable part as follows:

> "(5) Cases under internal revenue, customs, and tonnage laws.—Fifth. of all cases arising under any law providing for internal revenue."

The case at bar obviously arises under such a law, and the Circuit Court of Appeals properly so held. See also 108 F. (2d) 383, 385, 386.

The Statute laying down conditions precedent to suit is 26 U. S. C., Sec. 1672-1673 and reads as follows:

> "Secs. 1672-1673. Suits for refund—(a) Limitations—(1) Claim. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.
>
> (a) Time. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim which such suit or proceeding relates."

The Circuit Court of Appeals rested its decision solely on the second paragraph and held that the suit was not brought in time because of a credit it went outside the record and found was made in 1924.

In the first place failure to sue in time was not pleaded and hence not available to respondent. *Retzer* v. *Wood, Collector,* 109 U. S. 185 is unquestionably squarely in point. It is alone enough to dispose of this case. That case establishes that in a suit against a Collector the last paragraph of the above quoted Statute is not jurisdictional. See also the decision of the court below in the case at bar on the jurisdictional point and in *Toledo Edison Co.* v. *McMaken,* 103 F. (2d) 72, 75; also *Western Wheeled Scraper Co.* v. *United States,* 72 F. (2d) 487, 488 (C. C. A. 7th). Also rule 8(c) of the Rules of Civil Procedure states the Statute of Limitations must be pleaded. However, if the point be jurisdictional the allegation of the petition that the refund claims had never been disallowed affirmatively shows jurisdiction under the above quoted Statute. Place the petition (R. 4 to 7) beside the above quoted Statute and compliance is obvious.

In *United States* v. *Bertelsen & Petersen Engineering Co.,* 306 U. S. 276, this court said, at page 282, the credit "was a matter of defense, a justification for failure to refund and not a matter which destroyed taxpayer's cause of action or ousted the Court of jurisdiction". Yet the court below holds it destroyed the cause of action.

Paragraph 1 (a) of the last quoted Statute is the only one involved in the case at bar. The petition in the district court affirmatively showed compliance with this (R. 4 to 7). It shows the refund claims were on file more than six months before suit was begun and it alleges

these claims were never disallowed for the amount sued for (R. 6, 7).

There is nothing in this record about any credit having been made. "A matter of defense" must be pleaded and proved. Pleading, 21 Ruling Case Law, Secs. 69 and 70, pages 504 to 507.

If the Making of a Credit Is a Disallowance of a Refund Claim it Is Only Prima Facie So.

This court has expressly held a refund claim was not disallowed in a case where credit was made. *Bonwit, Teller & Co.* v. *United States*, 283 U. S. 258, 265 (note also page 11 of the government's brief in that case). See especially *Consolidated Paper Co.* v. *United States*, 59 F. (2d) 281, 289 (Ct. Cls.). If the refund claim had been disallowed there would have been nothing to credit.

However, if the making of a credit be the disallowance of a refund claim it is only *prima facie* so. It is, as this court has said, "a matter of defense." If pleaded and proved a plaintiff is entitled to an opportunity to meet it. For example, if it can show the overpayment was due to allowance of deductions which decreased its invested capital in 1920 and 1921 then the law provides no Statute of Limitations bars its claim. 44 Stat. At Large 66, construed and quoted in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296, 300. Also, if the government proves a claim was disallowed and plaintiff proves it subsequently was reopened and reconsidered the disallowance is avoided. *United States* v. *Berg Warner Co.*, 108 F. (2d) 424, 426. *Watts* v. *United States* 82 F. (2d) 266 (C. C. A. 2nd). *United States* v. *Botany Mills*, 89 F. (2d) 848. In the *Bertelsen & Petersen* case a credit was made and suit was not brought within two years there-

after but this court allowed recovery. There the credit was made July 27, 1926 (98 F. (2d) 132) and suit was filed September 19, 1929 (98 F. (2d) 134). It was proved that after the credit the Commissioner reconsidered the claim. This point was also urged on the Court of Appeals in the case at bar and ignored in its opinion.

Whether a claim is disallowed and when "at most presents a question of fact". *Borg-Warner Co.* v. *United States,* 108 F. (2d) 424, 427 (C. C. A. 7th). Petitioner has had no opportunity to try this fact issue. The pleadings did not even make it. At a trial it expects to produce the Commissioner of Internal Revenue to testify that he had no intention of disallowing the claim by the credit but intended to allow and pay it. (A credit was held a payment in *United States* v. *John Gallagher,* 83 F. (2d) 368.) For extended argument showing a credit is not a disallowance of a refund claim see *amicus curiae* brief of undersigned in *Bertelsen & Petersen Mfg. Co.,* case in this court.

The statute was not passed until 1928 expressly and retroactively declaring 1924 credits void. (For this Statute see *McEachern* v. *Rose,* 302 U. S. 56, 59, 60.) The Statute cannot be given retroactive effect if suits to recover such amounts were outlawed two years before it was passed. In such circumstances the expressly retroactive clause of the Statute is judicially nullified.

All of which is respectfully submitted.

JOHN E. HUGHES,
Attorney for Petitioner.

APPENDIX.

The Decision Below.

The following demonstrates beyond doubt the utter inability of the Court below to comprehend the case. The Court said:

> "The only question for our determination is, did the foregoing letter to appellant constitute notice to it of the disallowance of its refund claims." (R. 32.)

There was no such question in the case. If the claims were disallowed by this 1924 letter no notice of disallowance was required. *United States* v. *Michel*, 282 U. S. 656. It was not until 1932 that this decision was repealed by legislation.

The Court below in its opinion also said:

> "The record in the present case and the records in the two former appeals show that on February 2, 1924, the Commissioner by letter notified the appellant that its allowable refunds for 1918 and 1919 were being credited against additional taxes owed by it for the year 1917."

There is no such showing in the record of this case (if there is we quit right here) nor in the other record either. As a matter of fact, on February 22, 1924 the Commissioner didn't even know there would be a credit. See statement in *United States* v. *Swift & Co.*, 282 U. S. at page 472 explaining the procedure in detail. Not only does the Court below import the record of another case but it mistates that record. In another place in its opinion the Court states:

> "On February 2, 1924 the Commissioner of Internal Revenue, by letter, advised appellant that the claim for 1918 was allowed in the sum of $54,841.40" (R. 28).

How could this same letter notify it this claim was disallowed?

The Court below also holds the Statute of Limitations contained in the Revenue Act extinguishes the liability. The *Finn* case, which it cites, is neither an internal revenue suit nor one against a collector. The Court's holding in this respect is contrary to *Retzer* v. *Wood*, 109 U. S. 185 and to *Daube* v. *United States*, 1 F. Supp. 771, 772 (Ct. Cls.); *United States* v. *Krueger*, 121 N. (2d) 842; *United States* v. *Wyoming Central Assn.*, 70 F. (2d) 869, 871 (C. C. A. 10th) and *Helvering* v. *Newport Co.*, 291 U. S. 485, 488 to 491, all of which hold the Statute of Limitations in the Revenue Act does not extinguish the liability.

The Court below in its opinion also states as follows:

> "Section 1103 (b) of the Revenue Act of 1932, 47 Stat. 286, 26 U. S. C. A. Int. Rev. Acts, p. 324, amending Section 3226 of the Revised Statutes as reenacted in Section 1113 (a) of the Revenue Act of 1926, 44 Stat. 116, forbids a suit to be brought for the recovery of taxes more than five years after their payment "Unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit o rproceeding relates."

The 1932 Statute to which the Court refers is quoted at page 6 hereof and a glance at it will disclose that it contains no such provisions as the Court states it contains.

If taxpayer's action is barred it must be because of the provisions of some Statute. Where is that Statute? What is its provision?

The Court below confuses the rules of Civil Procedure. The petition in the District Court was filed before they became effective and they did not apply to it (112 F. (2d) 177, 182) but even if they did rule 8 (c) provides the Statute of Limitations must be affirmatively pleaded. A specific rule always supersedes a general one which would otherwise embrace the subject matter of the specific one.

Consent of the sovereign is not involved here. This action is a common law right as said by Justice Holmes, "The right to sue a Collector for an unjustified Collection was given by the common law." *United States* v. *Emery Co.*, 237 U. S. at p. 31. As said in *Kentucky Improvement Co.* v. *Slack, Collector,* 100 U. S. 648, 654. *Patton* v. *Brady,* 184 U. S. 608, 614, it is the common law action of assumpsit. Such an action proceeds on an equitable basis and the broadest and most liberal rules of pleading apply in construing a plaintiff's complaint. See 291 U. S. 386 at pages 402 and 403.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 636

A. G. REEVES STEEL CONSTRUCTION COMPANY, A CORPORATION, PETITIONER

v.

ELIZABETH WEISS, EXECUTRIX OF HARRY H. WEISS, FORMER COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 25–26) is not officially reported. The opinion of the circuit court of appeals (R. 30–37) is reported at 119 F. (2d) 472.

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1941 (R. 29). A petition for rehearing was denied June 25, 1941 (R. 41). The petition for a writ of certiorari was filed September 22, 1941. The jurisdiction of this Court is invoked

under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

A portion of taxes paid by petitioner for the years 1918 and 1919 were in 1924 credited to taxes for the year 1917, although collection of the 1917 taxes was then barred by the statute of limitations. In 1937 petitioner brought this suit against the executrix of the Collector of Internal Revenue who collected the 1918 and 1919 taxes, asking refund of the 1918 and 1919 taxes overpaid. The questions presented are:

1. Whether the defense of the statute of limitations may be raised by the Collector even though not specially pleaded.

2. Whether the action of the Commissioner, in 1924, crediting the overpaid taxes for 1918 and 1919 to 1917 taxes, constitutes a disallowance of petitioner's claims for refund of its 1918 and 1919 taxes so as to start the running of the two-year period of limitations.[1]

3. Whether it was proper for the district court and the circuit court of appeals to examine their own records in the two previous tax cases of this taxpayer, brought for recovery of the same sums, and to notice judicially the established and uncontroverted facts in these cases.

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[1] Although petitioner limits the questions presented to the first and third (Pet. 3–4), petitioner discusses the second question at length (Pet. 2, 4, 8–9, 10–11).

STATUTES INVOLVED

The statutes involved will be found in the Appendix, *infra,* pp. 13–16.

STATEMENT

The allegations of taxpayer's petition, filed in the district court (R. 4–23), may be summarized as follows:

In 1919 and 1920, taxpayer paid income and profits taxes in certain amounts for the years 1918 and 1919 respectively (R. 5, 6). In 1922 and 1923, taxpayer filed claims for refunds of a portion of these taxes (R. 5, 6), and by letter dated February 2, 1924, the Commissioner of Internal Revenue notified taxpayer of its overpayment of $54,841.40 for 1918, and of $34,764.26 for 1919 (R. 6, 7). The net income, invested capital and tax set forth in the Commissioner's letter were the true net income, invested capital and tax of the taxpayer for the years 1918 and 1919 (R. 7). Although the Commissioner allowed taxpayer's claims for refund for $54,841.40 and $34,764.26 for the years 1918 and 1919 respectively (R. 6, 7), no part of these allowed payments were ever refunded to taxpayer (R. 5, 6).

Taxpayer by its petition in the trial court disclaimed (R. 7) that it was suing on an account stated, but alleged that it brought its action under the Internal Revenue laws for money had and received by defendant's intestate in excess (by the respective sums of $54,841.40 and $34,764.26) of

the tax properly due for the years 1918 and 1919, with interest thereon as allowed by law.

Respondent filed a motion to dismiss taxpayer's petition upon the grounds: (1) that the district court had no jurisdiction; and (2) that the petition failed to state a cause of action (R. 24).

The district court granted the respondent's motion, upon the ground that taxpayer's several claims for refund had been disallowed by the Commissioner in 1924, and that taxpayer's action filed in March 1937, was therefore barred by Section 3226, Revised Statutes. The circuit court of appeals affirmed the decision of the district court (R. 29).

The exhibit relating to the notice of "overpayment" (R. 7, 9–23) attached to the pleadings shows only a determination by the Commissioner of overassessment (R. 16, 23). The district court and the circuit court of appeals, however, had before them certain established and uncontroverted facts regarding taxpayer's tax liability for the years 1918 and 1919. These facts were disclosed by the records of two previous suits which taxpayer had filed in the same district court and which it had appealed to the court below. In these earlier cases, taxpayer had sued for refund of 1917 taxes collected from it by credits from the years 1918 and 1919. Those pertinent additional facts appear in the opinion of the court below in the two earlier cases, i. e., *Routzahn* v. *Reeves Bros. Co.*, 59 F. (2d) 915, certiorari denied, 287 U. S. 650, and

United States v. *Reeves Bros. Co.*, 83 F. (2d) 121, certiorari denied, 299 U. S. 573, rehearing denied, 301 U. S. 713, and in the records in those cases. Those established and uncontroverted facts are as follows:

Taxpayer "overpaid its 1918 and 1919 taxes in the sum of $26,453.87 and $34,764.26, respectively" (*Routzahn* v. *Reeves Bros. Co.*, p. 916), and on May 6, 1924, the Commissioner of Internal Revenue authorized the disbursing clerk of the Treasury Department to apply the overpayments for 1918 and 1919 to the tax for 1917 (*United States* v. *Reeves Bros. Co., supra,* p. 121). This latter means that the Commissioner signed the schedule of refunds and credits May 6, 1924.[2] Cf. *Stearns*

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[2] According to the stipulation (R. 8, 10, 11, 12, 13) in case No. 272, October Term, 1936, this Court (*United States* v. *Reeves Bros. Co., supra*), the Commissioner assessed additional taxes for 1917 against the taxpayer on March 29, 1924, and on May 6, 1924, credited $26,453.87 of the overpayment for 1918 and the entire $34,764.26 overpaid for 1919 against the 1917 tax assessed. (Apparently, $28,387.53 of taxpayer's total overpayment for 1917 was credited on May 6, 1924, in satisfaction of taxes in that amount assessed against taxpayer for other years. (R. 86, case No. 272, October Term, 1936)). By later adjustment, however, set forth in paragraph 12 of the stipulation (R. 9, No. 272, October Term, 1936), *all overpayments for 1918 and 1919 "were refunded to plaintiff, except* * * * those of $26,453.87 [overpaid for 1918] and $34,764.26 [overpaid for 1919] * * * which were credited against unpaid taxes for 1917 * * *." The record in case No. 398, October Term, 1932, this Court (*Routzahn* v. *Reeves Bros. Co., supra*), contains the same stipulation (R. 10). It thus appears that taxpayer seeks to recover the full amount of the overpayments even though in fact some have already been refunded.

Co. v. *United States*, 291 U. S. 54, 58; *United States* v. *Swift & Co.*, 282 U. S. 468, 475–476. On May 6, 1924, the collection of the 1917 tax was barred. *United States* v. *Reeves Bros. Co., supra*, p. 121.

ARGUMENT

Taxpayer filed its present suit for the recovery of internal revenue taxes more than 16 years after payment of the taxes and more than 12 years after the Commissioner took action upon that part of the claims for refunds to which the suit allegedly relates. We submit that the court below was correct in holding that the suit is barred by Revised Statutes, Section 3226, as amended (Appendix, *infra*) which provides, *inter alia*, that no suit shall be maintained in any court for the recovery of any revenue tax after the expiration of five years from the date of payment of the tax unless within two years after the disallowance of the part of the claim to which the suit relates.[3]

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[3] Taxpayer disclaims (R. 7) that it is suing on an account stated. We have accordingly here directed our attention to the suit as one for recovery of taxes overpaid and unrefunded, which, we contend, is barred as not timely. But we believe, and if the Court grants taxpayer's petition for a writ of certiorari we shall urge, that in substance the instant suit is on an alleged account stated. Taxpayer sues on the Commissioner's "allowance" and thus acquiesces and relies on it. We submit that it cannot on the one hand rely and sue on the Commissioner's letter of February 2, 1924, as a correct statement of its account with the Government, and on the other hand effectively disclaim that its suit is not on an account stated theory. Such a suit, moreover, will lie only against the United States, and since the amount sued for exceeds $10,000, in the Court of Claims. *United States* v. *Savings*

1. Taxpayer contends that respondent cannot rely on Section 3226 because respondent did not specially plead the section as a statute of limitations. In a suit against the United States, the defendant is not required to plead plaintiff's non-compliance with Section 3226. *Finn* v. *United States,* 123 U. S. 227, 232–233; *Cheatham* v. *United States,* 92 U. S. 85, 88–89; *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7). And in a suit against the Collector, compliance with the first part of Section 3226, requiring that a claim for refund precede the suit, must be pleaded and proved by the taxpayer. *Savings Institution* v. *Blair,* 116 U. S. 200, 206; *Pacific Mills* v. *Nichols,* 72 F. (2d) 103, 105 (C. C. A. 1); *A. David Co.* v. *Grissom,* 64 F. (2d) 279, 281 (C. C. A. 4). No reason appears for making a distinction between the various provisions of section 3226 in this respect. This Court has stated that compliance with all the conditions imposed by the statute must be affirmatively shown before a suit could be maintained against a collector. *Arnson* v. *Murphy,* 115 U. S. 579, 584, 586. See also *United States* v. *Felt & Tarrant Co.,* 283 U. S. 269, 270, 273; *Rand* v. *United States,* 249 U. S. 503, 510. Cf. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373. This has been the result reached by the lower courts. *John F. Jelke Co.* v. *Smietanka,* 86 F. (2d) 470, 471–472

Bank, 104 U. S. 728, 734; *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258, 265.

(C. C. A. 7), certiorari denied, 300 U. S. 669; *Commissioners of the Sinking Fund of Louisville* v. *Buckner,* 48 Fed. 533, 535 (C. C. Ky.); *Public Service Ry. Co.* v. *Herold,* 229 Fed. 902 (C. C. A. 3). Cf. *Brampton Woolen Co.* v. *Field,* 55 F. (2d) 325, 328 (D. N. H.).

Petitioner relies upon *Retzer* v. *Wood,* 109 U. S. 185, and upon *Toledo Edison Co.* v. *McMaken,* 103 F. (2d) 72 (C. C. A. 6), certiorari denied, *sub. nom. Toledo Railways & Light Co.* v. *McMaken,* 308 U. S. 569. *Retzer* v. *Wood,* however, is plainly in conflict with the later decision of *Arnson* v. *Murphy,*[4] 109 U. S. 238, s. c., 115 U. S. 579, while the *Toledo Edison* case does not support taxpayer's argument.[5]

2. Taxpayer contends that its claim for refund was not disallowed, but that on the contrary it was expressly allowed (R. 6, 7; Pet. 8–9) and that,

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[4] The *Retzer* case has since been cited only in the contemporaneous case of *Fort Scott* v. *Hickman,* 112 U. S. 150, 165, on another point, while the *Arnson* case has been repeatedly cited with approval, and the rule announced therein has become the settled and prevailing one with respect to the prosecution of claims for the recovery of both customs duties and internal revenue taxes, and this whether the suit be against the United States or the collector.

[5] The same circuit court of appeals which decided this case decided the *Toledo Edison* case. The latter case holds only that where a personal judgment against the collector would be converted (by issuance of a certificate of probable cause) into a judgment which is in effect one against the Government, the collector is without power to waive as against the Government the statutory bar. Cf. *Royal Indemnity Co.* v. *United States,* 313 U. S. 289.

therefore, it could bring the instant suit at any time. But the claim was, in fact, partially disallowed.[6] On May 6, 1924, the Commissioner directed the disbursing clerk of the Treasury Department to apply the unrefunded overpayments for 1918 and 1919 to the tax for the year 1917 (*United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121 (C. C. A. 6)). Thus on that date, as the petitioner expressly conceded in the court below,[7] the Commissioner signed the schedule of refunds and credits.

This credit of the unrefunded 1918 and 1919 taxes to the 1917 tax may be regarded as constituting a refusal by the Commissioner to pay back to taxpayer its 1918 and 1919 overpayments, and, therefore, as a disallowance of taxpayer's claims for refund for 1918 and 1919.[8] *United States* v. *Bertelsen & Petersen Co.*, 306 U. S. 276, 279–280; *Gans S. S. Line* v. *United States*, 105 F. (2d) 955 (C. C. A. 2), certiorari denied, 308 U. S. 613; *John F. Jelke Co.* v. *Smietanka*, 86 F. (2d) 470, 473 (C. C. A. 7), certiorari denied, 300 U. S. 669; *First Nat. Bank of Beaver Falls* v. *United States*, 8 F. Supp. 484, motion for new trial denied, 9 F. Supp. 424 (C. Cls.), certiorari denied, 294 U. S. 717. Since

[6] The remainder was in fact refunded. See *supra*, footnote 2. No notice of the disallowance was necessary at that time. *United States* v. *Michel*, 282 U. S. 656.

[7] See page 4 of the taxpayer's petition for rehearing: "Not until May 6th did the Commissioner sign the schedule making the credit in the case at bar."

[8] A second view regards the credit of the 1918 and 1919 overpayments to the assessed 1917 tax as a *pro tanto* collec-

the instant suit is to recover the overpayment of the 1918 and 1919 taxes, taxpayer must fail under the uniform holding of these cases that the Commissioner's credit of an overpayment of one year in satisfaction of a barred tax for another constitutes a rejection of the claim for refund of the year originally overpaid.[9] And since the claim has thus been rejected, the present action, brought more than two years after the rejection, is barred under Section 3226 of the Revised Statutes. *Gans S. S. Line* v. *United States, supra,* pp. 956–957; *John F. Jelke Co.* v. *Smietanka, supra,* p. 473.

In any event, however the Commissioner's action be termed, it is clear, and taxpayer does not apparently dispute, that certainly not later than May 6, 1924, final administrative action had been taken

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tion of the 1917 tax. If this view is to be accepted, however, the taxpayer must fail without regard to time limitations, since he must file a claim for refund of the 1917 taxes thus collected, and sue for recovery of the 1917 taxes. *United States* v. *Swift & Co.*, 282 U. S. 468; *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 424; *United States* v. *Savings Bank*, 104 U. S. 728, 734; *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, 122 (C. C. A. 6), certiorari denied, 299 U. S. 573, rehearing denied, 301 U. S. 713. And such action lies only against the United States and in the Court of Claims, *United States* v. *Swift & Co., supra; Lowe Bros. Co.* v. *United States*, 304 U. S. 302.

[9] The statement in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265, upon which taxpayer relies (Pet. 8), was merely a passing observation upon an uncontroverted portion of the case. See the *Gans* case, *supra*, p. 957, in which this Court's statement was referred to as "dictum." And in any event, the *Bertelsen & Petersen Co.* case, *supra*, overruled the "dictum."

upon the taxpayer's claims for refund. The scheme of orderly tax collection, envisaged by Section 3226 of the Revised Statutes, requires that, once there has been definitive action by the Commissioner, as there was in the instant case, the dissatisfied taxpayer be required to take timely action. To accept the taxpayer's contentions in the instant case would be to defeat the purposes of this section, to abolish any period of limitations in cases like the present, and to permit the litigation of claims which have long since become stale.

3. In the instant case the courts below took judicial notice of the established and uncontroverted (and stipulated) facts, appearing in their own records in the two tax suits of taxpayer for recovery of its 1917 tax attempted to have been collected by credits from 1918 and 1919, that the Commisioner signed the schedule of refunds and credits (making the credits and rejecting and disallowing the claims for refund for 1918 and 1919) on May 6, 1924. This action was proper.[10] See *Dimmick* v. *Tomp-*

[10] Taxpayer's suggestion (Br. 9) that the trial court and the circuit court of appeals erred in holding taxpayer's claims for refund for 1918 and 1919 disallowed in 1924, for the reason that at the trial the taxpayer "expects to produce the Commissioner of Internal Revenue to testify that he had no intention of disallowing the claim by the credit but intended to allow and pay it" does not require a contrary result, since the making of the credit constituted, as a matter of law, a refusal by the Commissioner to pay such 1918 and 1919 taxes and a disallowance of the taxpayer's claims for refund. See *United States* v. *Bertelsen & Petersen Co.*, *supra*; *Gans S. S. Line* v. *United States*, *supra*; *John F. Jelke Co.* v. *Smietanka*, *supra*.

kins, 194 U. S. 540, 548; *Alexander* v. *Hillman*, 296 U. S. 222, 231; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336–337. See also *Bienville Water Supply Co.* v. *Mobile*, 186 U. S. 212, 217; *Kithcart* v. *Metropolitan Life Ins. Co.*, 88 F. (2d) 407, 411 (C. C. A. 8); *Kelly* v. *Johnston*, 111 F. (2d) 613, 615 (C. C. A. 9); *Booth* v. *Fletcher*, 101 F. (2d) 676, 679, fn. 2 (App. D. C.). On a motion to dismiss, a court need not accept as true allegations of fact which it will judicially notice to be otherwise than as alleged. *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498; *Southern Pac. R. Co.* v. *Groeck*, 68 Fed. 609 (C. C. S. D. Calif. 1895).

CONCLUSION

The district court was without jurisdiction to entertain taxpayer's action and the suit was therefore properly dismised. There is no conflict of decisions. The petition should be denied.

Respectfully submitted.

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OCTOBER 1941.

APPENDIX

STATUTES INVOLVED

Revised Statutes:

SEC. 3226 [as amended by Sec. 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9]. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

Sec. 3226, Revised Statutes, was later amended by Sec. 1103, Revenue Act of 1932, 47 Stat. 169, and by Sec. 807, Revenue Act of 1936, 49 Stat. 1648. (See U. S. C., Title 26, Secs. 1672–1673 for Sec. 3226, Revised Statutes, as amended.) However, in suits for the recovery of taxes instituted after the enactment of those amendments, where the claim for refund or credit was disallowed before June 6, 1932, the statute of limitations as previously provided by Sec. 3226 remains the same. See Sec. 1103 (b), Revenue Act of 1932.[11]

> SEC. 3228 [as amended by Sec. 1112 of the Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 619 of the Revenue Act of 1928, c. 852, 45 Stat. 791, and Sec. 1106 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 287]. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four

[11] Thus a disallowance before June 6, 1932 (date of passage of the Revenue Act of 1932), was effective even though the Commissioner sent taxpayer no notice. *United States* v. *Michel*, 282 U. S. 656.

years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

(b) Except as provided in section 284 of the Revenue Act of 1926, claims for credit or refund (other than claims in respect of taxes imposed by the Revenue Act of 1916, the Revenue Act of 1917, or the Revenue Act of 1918) which at the time of the enactment of the Revenue Act of 1921 were barred from allowance by the period of limitations then in existence, shall not be allowed. (U. S. C., Title 26, Sec. 1433.)

The same provisions appear as Section 3313 of the Internal Revenue Code (U. S. C., Supp. V., Title 26, Sec. 3313).

Revenue Act of 1921, 42 Stat. 227:

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, * * * the Revenue Act of 1917, or the Revenue Act of 1918, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *

Sec. 281, Revenue Act of 1924, 43 Stat. 253, and Sec. 284, Revenue Act of 1926, 44 Stat. 9, are substantially similar to Sec. 252, Revenue Act of 1921, quoted above, save that the two latter Acts provide that no credit or refund shall be allowed or made *after four years* from the time the tax *was paid* in the case of a tax imposed *by a prior Act,* unless before the expiration of that time taxpayer filed its claim for refund.

Judicial Code:

> SEC. 145. The Court of Claims shall have jurisdiction to hear and determine the following matters:
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> First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable: * * *
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> (U. S. C., Title 28, Sec. 250.)

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